NG KHIM YEOW & ANOR. v. REG.

[A. Cr. J. (Rose C.J.) October 28, 1959]

[Singapore — Magistrate's Appeal Nos. 135 & 146 of 1959]

Criminal Procedure — Trial — Joint trial — Adjournment of case against co-accused after conclusion of case against 1st accused — Absence of first accused or his counsel from adjourned hearing — Whether defect curable by section 440 of the Criminal Procedure Code (Cap. 132).

In this case the two appellants were jointly tried on a charge of extortion. The case against the 1st appellant was concluded on June 18, 1959. The case against the second appellant was adjourned to July 1. On the latter date further evidence was adduced. Neither the 1st appellant nor his counsel was present on the adjourned hearing.

Held: (1) the procedure followed amounted to a fundamental defect in the proceedings;

(2) In the circumstances it would not be an appropriate case for invoking the provisions of section 440 of the Criminal Procedure Code.

MAGISTRATE'S APPEAL.

T. T. Rajah for the appellants.

F. Seow (Crown Counsel) for the respondent.

Rose C.J.: The two appellants were originally charged with theft in a dwelling house contra section 380 of the Penal Code, but at a late stage of the proceedings the charge was amended to one of putting the complainant in fear of death "in order to the committing of extortion" contra section 387 of the Code.

The facts of the case which are stated in the Grounds of Decision of the learned District Judge are unusual and there were certain omissions in the prosecution case which would seem to invite comment, for example, the omission to produce the original demand note which was a vital element in the extortion story. The point, however, that causes me the most concern is that while the two appellants were jointly tried it appears from the record — and I am informed from the Bar that the procedure followed was in fact correctly set out in the record — that the case against the first appellant was concluded on the 18th of June 1959, learned Counsel for the first appellant having made his final address to the Court on that date, while the case against the second appellant was adjourned to the 1st of July.

On the latter date further evidence was adduced running to some six pages of typewritten record and subsequently learned counsel for the second appellant made his final address to the Court.

Learned counsel for the first appellant was not present at this adjourned hearing and there is nothing on the record to indicate that the first appellant himself was there, nor is it suggested by the learned Deputy Public Prosecutor that I should assume that he was. This procedure seems to me to amount to a fundamental defect in the proceedings.

In the light of such a marked departure from normal practice, I am not prepared to speculate as to whether the result of the trial would have been the same had the correct procedure been followed. In the circumstances, this would not seem to be an appropriate case for invoking the provisions of section 440 of the Criminal Procedure Code.

The appeal must therefore be allowed in the case of both appellants, and their convictions are set aside.

Appeal allowed.

E'SINGAM v. DR. SUNDRAM & ORS.

[O. C. J. (Adams J.) March 18, 1960]

[K. L. — Originating Motion No. 6 of 1957]

Practice — Interlocutory injunction — Issue only in pending suits — Originating summons not appropriate form of procedure in such matter, R.S.C. 1957, O.50 r.6.

Notice of Motion — Inability of Court to decide other issues in.

This was an application by way of interlocutory injunction, *inter alia*, to declare that the Annual General Meeting of the Football Association of Selangor was *ultra vires* the rules of the association and therefore void and of no effect.

Held: the question at issue being one of fact, it had to be determined in open court and was not suitable for determination by the procedure of originating summons.

Cases referred to:—

(1) *Foon Seong* v. *Chan San Choon* [1947] M.L.J. 85.

(2) *Choo Yin Loo & Ors.* v. *Registrar of Societies, F.M. & Ors.*, [1957] M.L.J. 228.

(3) *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615.

(4) *Thelluson* v. *Viscount Valencia* [1906] 1 Ch. 480.

APPLICATION for Interim Injunction.

C. C. Rasa Ratnam for the applicant.

R. R. Chelliah for the respondents.

Adams J.: This was an Originating Motion in which the Plaintiff sought the following reliefs:

(a) to issue an order for an Interim Injunction upon the respondents restraining the respondents and the Football Association of Selangor and its Council from acting, officiating and or doing the work and other duties for and on behalf of the Football Association of Selangor and its Council and to refrain them from expending the moneys of the Association.

(b) to direct and order Mr. G. Preston, the Chairman of the Sub-Committee of the Council of the Football Association of Selangor 1959, to convene with due notice another Annual General Meeting of the members of the Football Association of Selangor, at Kuala Lumpur, confined to and limited only, to those members so affiliated and so either registered or exempted in accordance with and in conformity with Rule 12 (a) and 12 (b) of the Rules of the said Association.

(c) and/or to declare that the Annual General Meeting of the Football Association of Selangor held at the Selangor Club, Kuala Lumpur, on the 6th day of February, 1960, is *ultra vires* the Rules and therefore void and of no effect.

(d) to authorise the respondents to defend this application on behalf of the Football Association of Selangor.

The respondents were stated to be the members of the Committee of the Football Association of Selangor, a Society registered under the Societies Ordinance, 1949. I take it that the respondents are registered as officers for the current year with the Registrar of Societies and therefore it is sufficient to proceed against the Football Association of Selangor in the name of one of the officers under the provisions of the Societies Ordinance 1949 section 26A(b) in the event of the Society not having declared one of its members to the Registrar of Societies as the person in whose name the club may be sued.

The granting of interlocutory injunctions is provided for under Order 50 r. 6 of the Rules of the Supreme Court. It is quite impossible to have an interlocutory injunction unless there is a suit pending nor is it possible for the Court to decide the other issues in the Notice of the Motion.

The relief that the applicant is asking for in these proceedings can only be decided after the calling of evidence to establish whether or not the Annual General Meeting was lawfully constituted and whether or not the election of the officers was in accordance with the constitution of the club. These are pure matters of fact. In *Foon Seong* v. *Chan San Choon,*[1] Bostock Hill J. said:

"What the plaintiff is really asking is for a decision as to whether there was a valid trust by Foong Onn Kwan (deceased) in favour of the plaintiff. Mr. MacDuff was unable to cite any authority to show that procedure by way of Originating Summons under section 467 (1) was an appropriate form of procedure in such a matter and I am of the opinion that the application is misconceived, and that the plaintiff cannot in an Originating Summons based on an alleged trust ask for evidence to be heard to prove that trust. Moreover the question at issue is a question of fact and not of law and will have to be determined in open court and is not suitable for determination by the procedure of Originating Summons."

Order 1 r. 1 of the Rules of the Supreme Court provides that unless otherwise provided for all proceedings of a civil nature in this court must be by way of action and Order 2, r. 1, provides that every action shall be commenced by writ. Unless therefore the applicant can bring himself within the other provisions he must of necessity commence his action by writ. But since this case is bound to turn on an issue of fact which will have to be established by the examination and cross-examination of witnesses procedure by way of Originating Summons even if this case could be brought within the provisions of Order 54A r.1. would not be suitable or proper. I am supported in my contention by a judgment of Buhagiar J. in *Choo Yin Loo & Ors.* v. *Registrar of Societies, F.M. & Ors.*[2] In that case there was a dispute as to the legality of the passing of certain amendments to the rules. The learned Judge said at the end of the judgment:

"The proper remedy in this case is for the members of the Association to contest the validity or invalidity of the meeting of the 4th December, 1955, before a competent court and indeed there is a suit pending whether this matter is in issue."

There are two English cases in which the relief prayed for is similar to the present case viz: *Dawkins* v. *Antrobus,*[3] and *Thelluson* v. *Viscount Valencia.*[4] Both these cases were actions started by writ with a statement of claim and the actions proceeded to trial.

What the applicant should have done in this case was to have taken out a writ and if he wished to ask for an interlocutory injunction to have served notice of motion asking for an interim injunction with the service of a writ. For the above reasons I decided that the procedure adopted in this matter was misconceived and I therefore dismissed the application with costs.

Application dismissed.

NG KIM PONG v. YEOW KIM PONG REALTY LIMITED

[C.A. (Thomson C.J., Smith and Ong JJ.)
May 11, 1959]

[K. L. — Civil Appeal No. 21 of 1958]

Contract — Part-payment — Non-Payment — Time not essence of the contract — Rescission of contract — Whether entitled.

Contract (Malay States) Ordinance, 1950, ss.56 and 92.

The plaintiff appealed against a judgment dismissing his claim for the return of moneys paid by him and for damages for breach of contract for sale and purchase of land.

On March 24, 1956 the plaintiff entered into an agreement to purchase from the defendants 22 building lots for the sum of $66,000 and made part-payment of $15,000 towards the purchase price. Clause 2 of the agreement provided for payment of a further portion of the purchase money amounting to $24,000 on or before June 23, and the balance of $27,000 on or before December 23, 1956. The plaintiff failed to pay the $24,000 due on June 23 and on June 25 the defendants sought to forfeit the part-payment and to claim damages sought to forfeit the part-payment.

On the same day that he received the notice of forfeiture (June 25) the plaintiff wrote to the defendants requesting an extension of time of one month to pay them the $24,000. The defendants intimidated that they agreed to an extension of time provided the plaintiff paid $5,000 on or before 7th July and the balance of $19,000 by July 31. The plaintiff duly paid the $5,000 on July 7. In order to obtain his receipt the plaintiff was forced to sign an acceptance of certain conditions, one of which was that construction work must have begun on any land sought to be transferred.

Subsequently the plaintiff found 2 persons willing and able to buy 8 lots for $24,000 which sum they deposited with a solicitor. The plaintiff informed the defendants of this fact and requested them to send the titles for examination by the solicitor for the purchasers.